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In the Supreme Court of the United States

OCTOBER TERM, 1974

INTERCOUNTY CONSTRUCTION CORPORATION and HARTFORD ACCIDENT & INDEMNITY COMPANY, PETITIONERS

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER OF THE BUREAU OF EMPLOYEES' COMPENSATION OF THE UNITED STATES DEPARTMENT OF LABOR
and
MARY JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Summary of argument	8
Argument	12
A claimant who files a claim within the time provided in Section 13(a) is entitled to an adjudication and need not file an additional application after the employer has discontinued payments of compensation	12
A. As enacted in 1927, Section 22 applied only to the modification of a compensation award	15
B. As amended in 1934 and 1938, Section 22 remained applicable only to modifications of compensation orders	18
1. Proposals to change Section 22 were prompted solely by its excessive restrictions on modifications of awards	18
2. The 1934 amendment was designed to extend the time during which an outstanding award could be modified	21
3. The legislative history of the 1938 amendment shows that Section 22 was regarded as relevant only to the power to modify compensation orders	24
C. The structure, language and purposes of the Act neither contemplate nor require a second claim for compensation	27
1. Requiring a further notice in addition to a Section 13(a) claim would be inconsistent with the Act's design and purpose	27
2. Section 22, as it presently stands, is more logically read as not applicable to unadjudicated claims	29

A claimant who files a claim etc—Continued
C. The structure, language etc—Continued
3. No interest of an employer or its insurer is jeopardized by allowing the employee's claim to be adjudicated after voluntary payments have ceased — Page 31
Conclusion — 38

CITATIONS

Cases:

American Mutual Liability Ins. Co. v. *Lowe*, 85 F. 2d 625 — 18
Atlantic & Gulf Stevedores, Inc. v. *Donovan*, 274 F. 2d 794 — 13, 34
Baltimore & Phila. Steamboat Co. v. *Norton*, 284 U.S. 408 — 28
Banks v. *Chicago Grain Trimmers Association*, 390 U.S. 459 — 24
Butler v. *District Parking Management Co.*, 363 F. 2d 682 — 33
Dillard v. *Virginia Industrial Commission*, 416 U.S. 783 — 33
F. Jarka Co. v. *Monahan*, 29 F. 2d 741 — 17, 18–19
Griggs v. *Duke Power Co.*, 401 U.S. 424 — 26
Henderson v. *Glens Falls Indemnity Co.*, 134 F. 2d 320, certiorari denied, 319 U.S. 756 — 29
Industrial Commission v. *McCartin*, 330 U.S. 622 — 34
Jarka Corp. v. *Hughes*, 299 F. 2d 534 — 30
Love v. *Pullman Co.*, 404 U.S. 522 — 28
Lumber Mutual Casualty Insurance Co. v. *Locke*, 60 F. 2d 35 — 10, 17
Maryland Casualty Co. v. *Cardillo*, 99 F. 2d 432 — 14
Mille v. *McManigal*, 67 F. 2d 644 — 18, 19
O'Keeffe v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 — 26
Power Reactor Co. v. *Electricians*, 367 U.S. 396 — 26
Robinson v. *Bradshaw*, 206 F. 2d 435, certiorari denied, 346 U.S. 899 — 33
Strachan Shipping Co. v. *Hollis*, 469 F. 2d 1108, certiorari denied *sub nom. Lewis* v. *Strachan Shipping Co.*, 409 U.S. 887 — 8
Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 — 26

Cases—Continued

Page
Udall v. *Tallman*, 380 U.S. 1 — 26
Young & Co. v. *Shea*, 397 F. 2d 185 — 33

Statutes and regulations:

Act of May 26, 1934, 48 Stat. 806, 807 — 2
District of Columbia Workmen's Compensation Act, 36 D.C. Code 501, *et seq* — 4
Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq* — 2, 4, 16
Section 4(b), 33 U.S.C. 904(b) — 13
Section 5, 33 U.S.C. 905 — 34
Section 6(a), 33 U.S.C. 906(a) — 32
Section 8(c)(19), 33 U.S.C. 908 (c)(19) — 32
Section 8(i), 33 U.S.C. (Supp. II) 908(i) — 12, 17, 28, 34
Section 12, 33 U.S.C. 912 — 27
Section 12(a), 33 U.S.C. 912(a) — 11, 13, 27
Section 12(d), 33 U.S.C. 912(d) — 13
Section 13, 33 U.S.C. 913 — 2
Section 13(a), 33 U.S.C. 913(a) — passim
Section 13(c), 33 U.S.C. 913(c) — 25
Section 13(d), 33 U.S.C. 913(d) — 25
Section 14(a), 33 U.S.C. 914(a) — 13, 32
Section 14(b), 33 U.S.C. 914(b) — 13
Section 14(d), 33 U.S.C. 914(d) — 13
Section 14(h)(2), 33 U.S.C. 914(h)(2) — 13, 34, 35
Section 14(m), 33 U.S.C. (1958 ed.) 914(m) — 5
Section 15(b), 33 U.S.C. 915(b) — 17, 28
Section 16, 33 U.S.C. 916 — 17, 28
Section 19(a), 33 U.S.C. 919(a) — 3, 15
Section 19(c), 33 U.S.C. 919(c) — 7, 11, 13, 14, 34
Section 19(d), 33 U.S.C. (Supp. II) 919(d) — 7
Section 21(a), 33 U.S.C. (Supp. II) 921(a) — 7
Section 21(b), 33 U.S.C. 921(b) — 7
Section 21(b), 33 U.S.C. (Supp. II) 921(b) — 7
Section 21(c), 33 U.S.C. (Supp. II) 921(c) — 7
Section 22, 33 U.S.C. 922 — passim
Section 30(a), 33 U.S.C. 930(a) — 12, 32
Section 30(f), 33 U.S.C. 930(f) — 25
20 C.F.R. (1938 ed.) 31.5 — 25
20 C.F.R. (1938 ed.) 31.15 — 9, 25
20 C.F.R. (1949 ed.) 31.16 — 25

Statutes and regulations—Continued	Page
20 C.F.R. (1972 ed.) 701.201	19
52 Stat. 1167	24
Pub. L. 92-576, § 12(b), 86 Stat. 1251, 1259	2
5 U.S.C. 8173	34
42 U.S.C. 1651(c)	34
Miscellaneous:	
Twelfth Annual Report of the United States Employees' Compensation Commission 39–40 (1928)	20
Thirteenth Annual Report of the United States Employees' Compensation Commission 79–89 (1929)	20
Fourteenth Annual Report of the United States Employees' Compensation Commission 75 (1930)	20
Fifteenth Annual Report of the United States Employees' Compensation Commission 77 (1931)	20
Sixteenth Annual Report of the United States Employees' Compensation Commission 49 (1932)	20
Seventeenth Annual Report of the United States Employees' Compensation Commission 18 (1933)	20, 21
Eighteenth Annual Report of the United States Employees' Compensation Commission 38 (1935)	24
H. Rep. No. 1244, 73d Cong., 2d Sess.	22, 23
H. Rep. No. 1807, 74th Cong., 1st Sess.	24
H. Rep. No. 1945, 75th Cong., 3d Sess.	24
H. Rep. No. 2337, 74th Cong., 2d Sess.	24
Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 8293, 74th Cong., 1st Sess.	24, 25
Hearing before Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 3625 and H.R. 5690, 75th Cong., 1st Sess.	24–25
Hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 5690, 75th Cong., 3d Sess.	25
S. Rep. No. 588, 73d Cong., 2d Sess.	22
S. Rep. No. 1199, 74th Cong., 1st Sess.	24
S. Rep. No. 1988, 75th Cong., 3d Sess.	25

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BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (App. 26–37) is reported at 500 F.2d 815. The district court's order (App. 25) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1974 (App. 38). The petition for a writ of certiorari was filed on September 30, 1974, and was

granted on January 20, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an individual who has filed a timely claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act must also file an application for review of his case, after his employer terminates payments of compensation without an award, in order to avoid forfeiture of his right to an adjudication of his original claim.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, provided in relevant part:[1]

Section 13. Time for Filing of Claims.

(a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

[1] An amendment to Section 13, not relevant to this case, was enacted in 1972. Pub. L. 92-576, § 12(b), 86 Stat. 1251, 1259. The amendment adds an introductory phrase "[e]xcept as otherwise provided in this section," and provides that the time for filing a claim does not begin to run until the employee or beneficiary is aware, or should have been aware, of the relationship between the employment and the injury or death.

* * * * *

Section 19. Procedure in Respect of Claims.

(a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner * * * at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

Section 22. Modification of Awards.

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to

become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

STATEMENT

On July 19, 1960, Charles E. Jones was injured when, during the course of his employment as a pile driver with the Intercounty Construction Corporation, he fell about 20 feet to the ground, landed on his head, and fractured his skull (App. 17). On August 8, 1960, he filed a claim (App. 3) against Intercounty and its compensation insurer, Hartford Accident & Indemnity Company, under the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501, *et seq.*, which makes the Longshoremen's and Harbor Workers' Compensation Act (the "Act") applicable to employment in the District of Columbia.

The claim alleged that Jones was entitled to compensation because, during the course of his employment, he had sustained a permanent disability, the extent of which could not yet be determined (App. 3). Hartford filed an answer to the claim on August 25, 1960, admitting that Jones had sustained a compensable disability but denying "that claimant was permanently disabled to the extent stated in the claim" (App. 4). At the same time Hartford also filed with the Deputy Commissioner of the Bureau of Em-

ployees' Compensation of the Department of Labor a notice that it had begun paying Jones compensation at the rate of $54 per week, which was then the maximum weekly payment under the Act (App. 6). Accordingly, the Deputy Commissioner took no action on Jones' claim.

More than four years later, on January 6, 1965, while continuing to make payments, Hartford filed a notice that it would controvert Jones' claim, because (among other things) it did not agree with the claimed extent of disability (App. 7). Then, on April 27, 1965, the insurer reduced Jones' weekly payments to $27, claiming that Jones' disability was not total but only 50 per cent (App. 9). Hartford also represented that Jones was by then "ready for permanent rating" (App. 8). Jones protested, and an informal conference was convened in the Deputy Commissioner's office on August 26, 1966. During this conference Jones' representative asserted that Jones was permanently and totally disabled (App. 29). The Deputy Commissioner took no action to adjudicate the claim, however, nor did any party request him to take final action (*ibid.*; cf. App. 22).

Hartford continued to make payments at the reduced rate until January 23, 1968, when the compensation paid to Jones reached $17,280, which was then the maximum liability under the Act for permanent partial disability or temporary total disability incurred prior to 1961 (33 U.S.C. (1958 ed.) 914(m)). Since it continued to deny that Jones was permanently and totally disabled, Hart-

ford declined to pay any further compensation (App. 12).[2]

On February 11, 1970, Jones requested a hearing on his claim for compensation. The requested hearing was held on December 21, 1970, and January 14, 1971. Deputy Commissioner Walter concluded that, as a result of his fall and fractured skull in 1960, Jones had suffered "a severe organic personality alteration, secondary to brain damage" that precluded gainful employment, that "such disability is permanent in nature," and that as a result of the accident Jones "requires continuous medical treatment and frequent hospitalization" (App. 17).[3] In spite of his conclusion that Jones was permanently and completely disabled, however, Deputy Commissioner Walter rejected Jones' claim for benefits because "the claim for payment of additional compensation was not filed within a year of * * * the date on which the last installment of compensation was paid to the claimant * * *" (App. 19).

Jones sought review of this decision in the United States District Court for the District of Columbia, and the government consented to a remand so that the Deputy Commissioner could enter a new order. On

[2] After the 1965 reduction in benefits Jones had been advised by letter of his opportunity to contest Hartford's action (App. 10–11). No notice of opportunity to contest accompanied or followed the 1968 termination of benefits.

[3] Partly as a result of the brain damage caused by the accident, Jones has been declared incompetent by the Florida state courts (App. 18). He is represented in this Court by his wife, who has been appointed as his guardian. Jones also receives Veterans' and Social Security benefits; he is rated totally disabled for both purposes (App. 14).

remand Deputy Commissioner Walter concluded that "the status of [a] claim once filed remains open and unaffected until a compensation order is filed and issued" (App. 22), and, accordingly, that Jones had not been required to file any claim after Hartford had discontinued payments to him. Based on the earlier conclusion that Jones was permanently and completely disabled, Deputy Commissioner Walter ordered Hartford to resume payments to Jones and to make back payments of $15,282 and interest (App. 23–24).

This action was then commenced in the same district court by Intercounty and Hartford, seeking injunctive relief against the compensation order on the ground that Section 22 of the Act bars the Deputy Commissioner from adjudicating a claim unless the claimant renews his claim within a year after the termination of voluntary payments of compensation.[4]

[4] Prior to the 1972 amendments to the Act, hearings on claims for disability benefits were held before a deputy commissioner (Section 19(c), 33 U.S.C. 919(c)) and review could be sought in a district court (Section 21(b), 33 U.S.C. 921(b)). Under the revised procedures all of the hearing powers of deputy commissioners have been assumed by hearing examiners (now administrative law judges) (33 U.S.C. (Supp. II) 919(d)). Decisions of a hearing examiner are "effective" once filed in the office of a deputy commissioner (33 U.S.C. (Supp. II) 921(a)), but may be appealed, at the behest of any party, to a Benefits Review Board appointed by the Secretary of Labor (33 U.S.C. (Supp. II) 921(b)). Decisions of the Benefits Review Board can be reviewed by a petition to the court of appeals for the circuit in which the injury occurred (33 U.S.C. (Supp. II) 921(c)). In the interest of uniformity references in this brief are to pre–1972 procedures. However, all references and arguments are equally applicable to current procedures.

The district court, relying upon *Strachan Shipping Co.* v. *Hollis,* 460 F.2d 1108 (C.A. 5), certiorari denied *sub nom. Lewis* v. *Strachan Shipping Co.,* 409 U.S. 887, agreed with petitioners' construction of the Act, and enjoined the Deputy Commissioner from implementing the challenged order (App. 25).

Deputy Commissioner Walter appealed, and Jones' guardian intervened. The court of appeals reversed (App. 26–37), holding that Section 22 of the Act requires a claim for additional compensation to be made only when

> the deputy commissioner had "finally acted" by issuing or denying a compensation order. The [section] was not intended to impose an additional time barrier to recovery by claimants who filed within the time permitted by Section 13, and were still awaiting an order on the filed application [App. 34].

Because the Deputy Commissioner had not previously acted on Jones' original claim for compensation, which had been timely filed, the court of appeals held that the compensation order should be reinstated.

SUMMARY OF ARGUMENT

The time limitation of Section 22 of the Act applies only to applications to modify administrative decisions on compensation claims. Although the time limitation contained in Section 22 runs from the date of the last payment of compensation, whether or not that payment was made after a prior award, this does not mean that the Section is applicable even if no award has been entered. The applicability of Section 22 is triggered by the issuance of a compensation order and

only then does the limitations period upon rehearings become applicable.

A. Section 22 was part of the original version of the Act, and, as enacted in 1927, it provided that a deputy commissioner may, during the term of an award and after it has become final, review the order and modify it because of a change of circumstances. As petitioners acknowledge, it was expressly limited to modifications of formal compensation orders, and this limitation was understood by the courts. Consequently, *Lumber Mutual Casualty Insurance Co.* v. *Locke,* 60 F. 2d 35 (C.A. 2), held that a deputy commissioner could make an initial award, based on a prior but unadjudicated claim, well after the payment of compensation without an award had terminated.

B. The strict "during the term of an award" limitation on the time for review prompted calls for revision. The United States Employees' Compensation Commission proposed that the time should be lengthened in the interest of justice, in order to provide for the case in which the "term" of an award expired prior to its entry. In 1934 Congress followed this recommendation, and amended Section 22 to provide that a deputy commissioner may "review" a compensation case, and enter "a new compensation order," at any time "prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued * * *." Congress thereby furnished a more adequate period of time—a full year after the last payment of compensation—within which to review a compensation order or award. References to "modification" of awards recur in the committee reports and recommendations of the Commission, and

there is no indication that any member of Congress thought that the revised language altered Section 22 in any way other than by extending the time within which to seek modification.

Section 22 was amended again in 1938, and Congress for the first time made it possible for a deputy commissioner to review an order denying compensation. Again the legislative history is replete with references to the scope of the Section. Committee reports stated that it applied to cases that previously had been finally acted upon by the deputy commissioner.

At about the same time as the 1938 amendment was adopted the Commission for the first time promulgated regulations interpreting Section 22. These rgulations, which are entitled to great deference as contemporaneous administrative interpretations by the agency charged with administering the statute, described proceedings under Section 22 as "application[s] to the deputy commissioner for review of a compensation case for modification of an award." 20 C.F.R. (1938 ed.) 31.15.

There is no support in either the legislative history or the language of Section 22 for petitioners' contention that it applies to unadjudicated claims for compensation. The language referring to the date of the last payment of compensation establishes the time from which the year within which to seek modification of an order begins; it does not establish the class of cases to which the period of limitations applies.

C. It is not necessary, or harmonious with the Act, to extend Section 22 to create a second "statute of limitations" applicable to claims that have not received an initial adjudication. The employer is put on notice of the injury and claim for compensation by the notice required by Section 12(a) and the "claim" required by Section 13(a). An additional notification under Section 22 would not add to the employer's notice of the claim, but would introduce a technical "trap" that could jeopardize legitimate claims. Indeed, the prospect of the extinguishment of a claim would encourage employers repeatedly to cease paying compensation, in the hope that a claimant would neglect to file an application under Section 22, and thereby impair the self-executing program of the Act.

Section 22 is most logically read as not applicable to unadjudicated claims. It allows a "new" compensation order to be entered only because of a change in conditions or a mistaken determination of fact by a deputy commissioner. Yet if no initial administrative decision has been made, there can have been no "mistake in a determination of fact," nor can there have been a "change" in the claimant's condition after the entry of an initial award. If, as petitioners contend, Section 22 applies to unadjudicated cases in which compensation has been paid without an award, a claimant whose condition is stable never could secure a resumption of wrongfully discontinued benefits. Congress cannot have intended this harsh result.

To the extent employers legitimately are concerned that, after payment of compensation without an award has been terminated, claims will grow stale and be reactivated years later to their prejudice, they may seek the entry of a compensation order under Section 19 (c). Alternatively, they could request a claimant to

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accept as full payment the amount paid to date; once such an agreement is approved by the deputy commissioner (33 U.S.C. (Supp. II) 908(i)) the employer is discharged. Other courses of action are available. But petitioners pursued none of them, and have not alleged that they were prejudiced by Jones' delay in asserting his rights after they improperly terminated his compensation. Jones therefore is entitled to an administrative decision on his claim; nothing in either the words or the history of Section 22 suggests that his claim should be extinguished without ever having been adjudicated.

ARGUMENT

A CLAIMANT WHO FILES A CLAIM WITHIN THE TIME PROVIDED IN SECTION 13(a) IS ENTITLED TO AN ADJUDICATION AND NEED NOT FILE AN ADDITIONAL APPLICATION AFTER THE EMPLOYER HAS DISCONTINUED PAYMENTS OF COMPENSATION

The Act provides that an individual injured in the course of certain employment is entitled to compensation at specified rates. The right to this compensation does not depend upon a formal program of claims and defenses. Instead, the Act is self-executing, and an employer is required to fulfill its obligations whether or not formal proceedings are commenced.

Within 10 days after learning that an injury has occurred in the course of its employ, an employer is required to notify the deputy commissioner for the compensation district in which the injury occurred. Section 30(a), 33 U.S.C. 930(a). An employee must

give similar notice within 30 days after being injured (Section 12(a), 33 U.S.C. 912(a)), but the giving of this notice is excused if the employer had actual knowledge of the injury (Section 12(d), 33 U.S.C. 912(d)). Within 14 days after notice of the injury the employer must begin making the payments called for by the Act (Section 14(b), 33 U.S.C. 914(b)). It need not and can not await the resolution of an employee's claim for compensation unless it disputes liabiiity, and then may withhold payments only to the extent of the dispute (Section 14(a), 33 U.S.C. 914(a)). If there is a dispute the employer must give prompt notice (Section 14(d), 33 U.S.C. 914(d)). Because the Act provides for employer liability without fault (Section 4(b), 33 U.S.C. 904(b)), there are relatively few disputes concerning compensation. Those disputes fall into two broad categories: the extent of disability attributable to the accident, and whether the accident took place in the course of covered employment.

The deputy commissioner is required to participate in the process only when a dispute requires resolution. A resolution by the deputy commissioner may be obtained by either party pursuant to Section 19(c), 33 U.S.C. 919(c). *Atlantic & Gulf Stevedores, Inc.* v. *Donovan,* 274 F. 2d 794 (C.A. 5). On some occasions the deputy commissioner has a duty to enter controverted cases on his own initiative in order to "protect the rights of all parties." Section 14(h)(2), 33 U.S.C. 914(h)(2).

Once the deputy commissioner has become involved he may resolve the dispute after a hearing or, if there

572-600—75——3

is no hearing, more than 20 days after all parties have been notified. Section 19(c), 33 U.S.C. 919(c); *Maryland Casualty Co.* v. *Cardillo,* 99 F. 2d 432 (C.A.D.C.). This decision often is postponed with the acquiescence of both parties; the dispute may turn on the extent or the duration of the disability, which may be more accurately ascertained at some time in the future.[5] Ordinarily, when the deputy commissioner believes that the controversy is ripe for decision, or always upon demand by any party, he holds a hearing and enters a compensation order, awarding or denying compensation. Subject to judicial review and the provision for modification contained in Section 22, this compensation order terminates the administrative proceedings.

Because the employer's duty to pay compensation does not depend upon a demand by the employee, no formal claim for compensation will be made in most cases. Should the employer controvert the extent of its liability, however, an employee must file a "claim," pursuant to Section 13(a), in order to safeguard the right to payment under the Act and to a resolution by the deputy commissioner of any disputes. This claim for compensation must be filed within one year of the injury or, if the employer pays compensation without an award, within a year of the last payment

[5] For example, in the instant case the accident occurred in 1960, and Hartford, although it controverted the claim, paid full compensation until 1965 when it notified the deputy commissioner that Jones was "ready" for a permanent rating (App. 8).

(Section 13(a)); once it has been filed the deputy commissioner "shall have full power and authority to hear and determine all questions in respect of such claim." Section 19(a), 33 U.S.C. 919(a).

Section 13(a), when read in conjunction with Section 19(a), appears to give the deputy commissioner full authority to make at least one compensation order in a disputed case so long as a Section 13(a) claim was timely filed. Petitioners contend, however, that Section 22—entitled "Modification of Awards"— compels an employee to file an application for "review" in order to preserve the right to an adjudication of his first claim. As it now stands, Section 22 allows the deputy commissioner, within "one year after the date of the last payment of compensation, whether or not a compensation order has been issued," to "issue a new compensation order" that may be required because of a change in conditions or "because of a mistake in a determination of fact by the deputy commissioner * * *." Jones did not, within a year after the last payment made by Hartford, seek a "new compensation order" under this Section. Therefore, petitioners assert, he has lost his right to a decision by the deputy commissioner on his original claim.

We submit that Section 22 applies, as its title indicates, only to the modification of a compensation order already entered by a deputy commissioner. Once an award has been entered an employee has one year after the termination of compensation payments—whether or not those compensation payments were

made pursuant to the award[6]—in which to seek a "new" compensation order on the ground of changed circumstances or mistake of fact. But nothing in Section 22 establishes a second statute of limitations applicable to unadjudicated claims for compensation. Petitioners' argument to the contrary is refuted by the history of Section 22, which, as enacted in 1927, was specifically directed at, and limited to, the modification of awards already entered. When Congress amended Section 22 in 1934, adding the words upon which petitioner relies, and again in 1938, it did so with a clear understanding that the Section covered only the modification of outstanding awards.

A. AS ENACTED IN 1927, SECTION 22 APPLIED ONLY TO THE MODIFICATION OF A COMPENSATION AWARD

Section 22 was part of the original version of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1437. Section 22 as first enacted provided (emphasis added):

> Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time *during the term of an award and after the compensation order in respect of such award has become final, review such order* in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase or decrease such compensation. Such new order shall not affect any compensation paid *under the authority of the prior order.*

[6] Because most payments under the Act are made voluntarily, without the necessity of a formal award even in disputed cases, there is a significant number of cases in which payments terminate prior to the making of an award. The award, once entered, may confirm the past payments without ordering additional compensation. In such cases Section 22 requires that modification of the award be sought within a year of the date of the last payment, rather than within a year of the date of the award. See pp. 21–23, *infra*.

As petitioners concede (Pet. Br. 23), this provision applied only to modifications of an award of compensation. It referred to a "prior order" and established a period during which modification could be sought that was completely dependent upon the term of the prior award.

It was so understood by the first courts to interpret it. In *F. Jarka Co.* v. *Monahan,* 29 F. 2d 741, 742 (D. Mass.), an injury was followed by compensation that terminated on April 18, 1928. Five days later the deputy commissioner made an award confirming the compensation previously paid and ordering no new compensation. When a new deputy commissioner modified the award four months later, the court set the modification aside because it had not occurred "during the term" of the previous award, as required by Section 22. The converse problem was presented in *Lumber Mutual Casualty Insurance Co.* v. *Locke,* 60 F. 2d 35, 37–38 (C.A. 2). An employee made a timely claim, but the deputy commissioner made no award. Pursuant to a "settlement"[7] the employer ceased mak-

[7] With the exception now codified in 33 U.S.C. (Supp. II) 908(i), "settlements" are barred by 33 U.S.C. 915(b) and 916, and are treated as if they were compensation paid without an award.

ing payments during September 1928, and the employee did not request additional compensation. But in January 1930 the deputy commissioner made an award, compelling the employer to pay additional compensation. The court of appeals concluded that this procedure was proper because, even though payments without the necessity of an award had long since ceased, the deputy commissioner's jurisdiction continued until he had made an initial award.[8] When the Second Circuit was presented with a situation similar to that in *F. Jarka Co.,* in which the payments without an award had ceased, an award then had been entered, and the employee later sought a modification, it concluded that Section 22 barred any change. *Mille* v. *McManigal,* 69 F. 2d 644 (C.A. 2).

B. AS AMENDED IN 1934 AND 1938, SECTION 22 REMAINED APPLICABLE ONLY TO MODIFICATIONS OF COMPENSATION ORDERS

1. Proposals to Change Section 22 Were Prompted Solely by its Excessive Restrictions on Modifications of Awards

Under the original version of Section 22 an application to modify an award could be made only "during the term of the award" and after the order making such an award had become final. Cases such as *F.*

[8] Cf. *American Mutual Liability Ins. Co.* v. *Lowe,* 85 F. 2d 625, 628 (C.A. 3), which was decided after the 1934 amendment but pertained to payment under the 1927 statute. A "settlement" was made and payment ceased during 1932. More than two years later the employee sought a decision, and the court allowed the deputy commissioner to proceed because a "settlement" is not an award. The Third Circuit, as had the Second, concluded that Section 22 did not affect the Deputy Commissioner's power to make an initial award.

Jarka Co. and *Mille* indicated that the federal courts would not construe Section 22 to allow claims for modification to be made after the payments made pursuant to the award had ended. But there were many cases similar to *F. Jarka Co.,* in which employer payments terminated and were confirmed by a subsequent award. Under the prevailing interpretation of Section 22 there could never be review or modification of the award entered in such a case, even if the employee's condition dramatically deteriorated, because the term of the award had expired before it became final. Moreover, because Section 22 provided that only "a change in circumstances" was a ground for the issuance of a new compensation order, no relief was available if a compensation order had been based upon a misapprehension of fact.

The United States Employees' Compensation Commission, which was then the agency responsible for administration of the Act,[9] suggested almost immediately after the passage of the Act that Section 22 was inadequate and should be amended:

> There being no general provision for reopening a decision once made by the deputy commissioner, except by review on application to the courts within 30 days, or excepting on the ground of a change in conditions, situations are continually arising in which the action taken by the deputy commissioner in correcting an error in an order may give rise to controversy

[9] This responsibility was later transferred to the Bureau of Employees' Compensation. In 1972 authority was retransferred to the Office of Workmen's Compensation Programs of the Department of Labor. See 20 C.F.R. (1972 ed.) 701.201–701.203.

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> and result in a failure to do justice to either the employer or the employee. It is accordingly recommended that an amendment be adopted which will give deputy commissioners the continuing authority to reopen cases that is usually conferred upon compensation boards. [*Twelfth Annual Report of the United States Employees' Compensation Commission* 39–40 (1928).]

The Commission renewed this recommendation the following year,[10] and restated in 1930 that "[a] review now authorized 'during the term of the award' is not sufficient in the interest of justice and the commission believes that section 22 should be amended * * *."[11] The Commission repeated this recommendation verbatim in 1931 [12] and 1932.[13] In 1933 it added the observation that "[i]n many cases the 'term of the award' has ended when the compensation order is issued."[14] There was no hint, either in the recommendations of the Commission or the observations of other contemporaries, that Section 22 was deficient because it allowed claims with respect to which no award had been made to be adjudicated initially after compensation without an award had ceased.

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[10] *Thirteenth Annual Report of the United States Employees' Compensation Commission* 79–80 (1929).

[11] *Fourteenth Annual Report of the United States Employees' Compensation Commission* 75 (1930).

[12] *Fifteenth Annual Report of the United States Employees' Compensation Commission* 77 (1931).

[13] *Sixteenth Annual Report of the United States Employees' Compensation Commission* 49 (1932).

[14] *Seventeenth Annual Report of the United States Employees' Compensation Commission* 18 (1933).

2. The 1934 Amendment Was Designed to Extend The Time During which an Outstanding Award Could be Modified

By an Act of May 26, 1934, 48 Stat. 806, 807, Congress responded to the recommendations of the Commission and amended Section 22 to provide:

> Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, review a compensation case in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. * * *

This amendment thus provided that the modification may be made "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued * * *." But there is no support in the legislative history for petitioners' interpretation of this language. The Senate and House committee reports were identical in all pertinent respects. Both houses of Congress quoted extensively from the Commission's Seventeenth Annual Report. Each committee wrote:

> [This bill] amends section 22 of the existing act so as to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the period, extends

> the time within which such modification may be made. * * *
>
> * * * * *
>
> The amendment is in line with the recommendation of the Commission except that it limits to 1 year after the date of the last payment of compensation the time during which such modification may be made. The amendment also permits an increase or decrease in the compensation under a modifying award when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the act, such modifying award to date from the time of the accident.

S. Rep. No. 588, 73d Cong., 2d Sess. 3–4; H. Rep. No. 1244, 73d Cong., 2d Sess. 4. Both committees indicated that the amendment was intended to apply, as did the original Section 22, only to the modification of awards. The committee reports repeatedly refer to "modification" of previously issued orders. The amended version of Section 22 specifies that a "new compensation order" is the outcome of an application for "review"; there is no indication in the legislative history that Congress intended to change the meaning of "new compensation order" between the 1927 version and the 1934 amendment. In both cases the language is explicable only as an order modifying an earlier award.

The new language seized upon by petitioners—the limitation of time during which a new compensation order could be issued to "one year after the date of the last payment of compensation, whether or not a

compensation order has been issued"—does not introduce new considerations into Section 22. Before the amendments, if compensation paid with or without a compensation order terminated prior to the entry of an award, no review or modification of the award was possible. The amendments, recognizing this situation, but implementing the congressional decision to limit "the period * * * within which such modification could be made," did not entirely preclude such anomolous situations. After the amendment it still could be true that, if compensation payments terminated before a compensation order was entered, no modification would be possible. But because of the enlargement of the time available for review, the termination would have had to precede the compensation order by a full year in order to preclude later modification of the order. Whatever reason there may have been for allowing the termination of compensation prior to the entry of an erroneous award to cut off opportunities for modification of the award,[15] the Section after its amendment remained a limitation only on the modification of prior orders, and it was so understood by Congress.

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[15] The language of the amendments was transmitted to Congress by the Commission and had the support of both employer and employee associations. It was a compromise, "the result of numerous and extended conferences between the maritime employers' organizations * * * and the international longshoremen's associations * * *." H. Rep. No. 1244, *supra*, at p. 1. It was enacted as recommended without any relevant change. No committee hearings were held and there were no recorded debates. Consequently, it is impossible to know what considerations underlay this particular compromise.

3. The Legislative History of the 1938 Amendment Shows that Section 22 was Regarded as Relevant Only to the Power to Modify Compensation Orders

The amendment made to Section 22 in 1938, 52 Stat. 1167, does not affect this case. It added language permitting modification of a compensation order at any time prior to one year after the rejection of a claim, and did not alter the language upon which petitioners rely. Its legislative history previously has been discussed by this Court. See *Banks* v. *Chicago Grain Trimmers Association*, 390 U.S. 459, 463–465.

The amendment eventually enacted in 1938 was proposed by the Commission in 1935, approximately six months after the 1934 amendments had been passed. *Eighteenth Annual Report of the United States Employees' Compensation Commission* 38 (1935). Hearings were held during the next three years on this and other proposals to amend the Act. During all of these hearings and related legislative proceedings the congressional understanding of the meaning of Section 22, as amended in 1934, was remarkably consistent. Witnesses and committee reports repeatedly stated that Section 22 pertained only to cases that previously had been "finally acted upon by the deputy commissioner."[16] No intimation to the contrary is recorded.[17]

[16] See H. Rep. No. 1807, 74th Cong., 1st Sess. 5; S. Rep. No. 1199, 74th Cong., 1st Sess. 4; H. Rep. No. 2237, 74th Cong., 2d Sess. 5; Hearing before Subcommittee No. 4 of the House Committee on the Judiciary, on H.R. 3625 and H.R. 5690, 75th Cong., 1st Sess. 10, 20; H. Rep. No. 1945, 75th Cong., 3d Sess. 8–9; Hearings before a Subcommittee of the Senate Committee on the Judiciary, on H.R. 5690; S. Rep. No. 1988, 75th Cong., 3d Sess. 8–9. See also Hearing before Subcommittee No. 3 of the House Committee on the Judiciary, on H.R. 8293, 74th Cong., 1st Sess. 14.

[17] We do not believe that the statements excerpted at pp. 18–21 of petitioners' brief have a contrary thrust.

At approximately the same time as the 1938 amendment was adopted the Commission for the first time promulgated regulations interpreting Section 22. These regulations reflect the same understanding of the Section, and describe proceedings under Section 22 as "application[s] to the deputy commissioner for review of a compensation case for modification of an award." 20 C.F.R. (1938 ed.) 31.15; 20 C.F.R. (1949 ed.) 31.16.[18] As an essentially contemporaneous administrative in-

[18] 20 C.F.R. (1938 ed.) 31.5 provided, with respect to *claims* filed under the Act, that "where the said act provides for the running of the said year limitation from any other date, the provisions of said Act shall apply." Petitioners apparently argue (Pet. Br. 28) that this indicates that the Commission had acknowledged that Section 22 established a separate statute of limitations. But the "said year" is the year during which the claim required by Section 13(a) must be filed. It is undisputed that a timely claim was filed in this case. The other dates, referred to by the regulation, from which the "said year" would begin to run include the provisions of the Act that toll the limitations period of Section 13(a). See Section 13(c) (time to file claim of minor or incompetent runs from time of appointment of guardian); Section 13(d) (year for filing Section 13(a) claim does not begin until any common law damage action has been decided); Section 30(f) (time to file claim does not begin until employer has filed report of injury under Section 30(a), if that required report was not timely filed). Nothing in 20 C.F.R. (1938 ed.) 31.5 indicates that, once a timely Section 13(a) claim has been filed, a second claim must be made after the occurrence of a tolling event.

terpretation by the agency charged with administering the Act, this understanding of Section 22 is entitled to deference. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408.

Throughout its history, from its adoption in 1927 through its amendments in 1934 and 1938, Section 22 was regarded by Congress and by the Commission as a regulation upon the time during which compensation orders entered by a deputy commissioner could be reviewed.[19] Nothing in that history, or in the words of the 1934 amendment, supports petitioners' argument that Section 22 requires a compensation claimant to file a second claim, after voluntary payments have ceased, in order to preserve the right to an adjudication of an original timely claim.[20] As we now demonstrate, the interpretation of Section 22 we have described above is consistent with and supported by the language and structure of the Act itself.

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[19] Petitioners suggest (Pet. Br. 12–13, 24–25) that the government's decision not to appeal administrative cases interpreting Section 22 as an additional time bar indicates that the government accepted those decisions as correct. However, many other considerations, including the merits of a claimant's case, are considered by the government in the process of deciding whether to appeal a particular case, and it is inaccurate to suggest that failure to appeal signifies acquiescence in the legal statements contained in an opinion.

[20] Cf. *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256: "The plain import of [the 1934] amendment was to vest a deputy commissioner with broad discretion to correct mistakes of fact * * *."

C. THE STRUCTURE, LANGUAGE AND PURPOSES OF THE ACT NEITHER CONTEMPLATE NOR REQUIRE A SECOND CLAIM FOR COMPENSATION

1. Requiring a Further Notice in Addition to a Section 13(a) Claim Would Be Inconsistent with the Act's Design and Purpose

As we have discussed at pages 12–15, *supra*, the Act is predominantly self-enforcing. Once an employer has knowledge that an injury has occurred in the course of covered employment, it is under a statutory duty to begin compensation, whether or not an employee has made a formal claim for compensation. The "claim" required by Section 13(a) does not fulfill the function, usually assigned to a statute of limitations, of giving notice to a potential adversary so that claims do not become stale and evidence lost. Pursuant to Section 12, if the employer does not acquire actual knowledge of the injury within 30 days, recovery is barred; if the employer does not independently acquire knowledge (triggering its duty to pay compensation), it must be furnished by the employee. A Section 12(a) notice can fulfill this requirement. The employer then can take whatever steps are necessary to protect its interests. The claim under Section 13(a) serves as a formal joinder of issues—a notice of demand that the employee will assert his or her right to a formal adjudication before the deputy commissioner when, or if, the compensation paid by the employer without an award is unsatisfactory.

Once the employer has received the notice (under Section 13(a)) that the employee will assert the right to a formal administrative hearing, it would not be advantageous or necessary to the purposes of the Act

to require a second notice (under Section 22) to the same effect. Indeed, the requirement of a second notice in this statutory context would be even less justified than a requirement serving "no purpose other than the creation of an additional procedural technicality." *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (footnote omitted). It would serve to make it advantageous to the employer repeatedly to discontinue the payments contemplated by the Act, in the hope that some claimants would allow a year to go by without making a second claim for compensation. That would insulate the employer from further liability, even liability that, by hypothesis, it should bear. Such an incentive to discontinue the very payents which it is the central purpose of the Act to provide should not be created unless Section 22 will admit of no other construction; the Act should be "construed liberally in furtherance of the purpose for which [it was] enacted and, if possible, so as to avoid incongruous or harsh results." *Baltimore & Phila. Steamboat Co.* v. *Norton*, 284 U.S. 408, 414.

Moreover, the Act provides that settlements are invalid unless there is formal administrative approval. Compare Sections 15(b) and 16, 33 U.S.C. 915(b) and 916, with Section 8(i), 33 U.S.C. (Supp. II) 908(i). Thus, a claimant's right to an adjudication of the claim cannot be destroyed even by an express, informed agreement to accept a sum less than full compensation. But petitioners' construction of Section 22 would result in "waiver" of the right to full payment, after the filing of a claim, merely by the claimant's *inaction*. It is difficult to reconcile that proposed construction allowing extinguishment by inaction of a timely claim with the Act's express principle that the right to compensation cannot be modified even by agreement. See *Henderson* v. *Glens Falls Indemnity Co.*, 134 F. 2d 320 (C.A. 5), certiorari denied, 319 U.S. 756, which held that even a state court's authorization of a settlement is ineffective to preclude a deputy commissioner's later adjudication.

In any event, the language of Section 22 itself supports the reading we have suggested.

2. Section 22, As It Presently Stands, Is More Logically Read As Not Applicable to Unadjudicated Claims

Section 22 allows the deputy commissioner to "review a compensation case * * * and * * * issue a new compensation order" within a stated period of time. The reference to a "new" compensation order—in language retained from the 1927 version, which expressly contrasted the "new" order with a previous "final" order—suggests that a condition of the Section's application is the existence of an "old" or previous compensation order.

The 1934 addition does not alter the limited applicability of the Section; its limitation on the grounds for the issuance of a "new compensation order" precludes its application to unadjudicated cases. Under Section 22 only two grounds—a "change in conditions" or a "mistake in a determination of fact by the deputy commissioner"—may support the issuance of a new compensation order. The latter ground would not be available in an unadjudicated case because, by

definition, no fact previously has been determined by the deputy commissioner.

The former ground also would be unavailable to claimants. Two possible types of "change" can be imagined. One would be a change of condition since the time the deputy commissioner issued a compensation order.[21] We believe that this is the only correct reading of that language—a reading parallel to the Section's alternative ground of a "mistake in a determination of fact by the deputy commissioner" and consonant with the Section's reference to "a new compensation order." Second, there could be a change in conditions since the payments of compensation had been terminated. But, if this were adopted as an alternative or additional reading of Section 22, many claimants could be completely deprived of an administrative adjudication simply because there would be no "change" in their condition after their employer improperly discontinued compensation. Were the claimant's condition stable, no review would be available even if the claimant sought review within a year of a wrongful termination of payments, because there would have been no "change."[22] The employer and its insurer therefore could prevent a claimant from ever receiving an adjudication of his claim. There is no

[21] Cf. *Jarka Corp.* v. *Hughes*, 299 F.2d 534 (C.A. 2).

[22] In particular, even if Jones had protested the same date Hartford had discontinued payments, review of this case would be impossible under petitioners' interpretation of Section 22. Jones does not allege that there has been a change in conditions; he contends, instead, that he has been totally and continuously disabled since the date of his injury.

reason to believe that Congress intended this harsh result, yet it would be the consequence of petitioners' contention that, in all cases in which compensation had been paid without the necessity of an award, the conditions of Section 22 must be satisfied before a timely claim under Section 13(a) can be adjudicated.

We submit that it is more consistent, both with the structure of the Act and with the language of Section 22, to conclude that the critical language of that Section—"one year after the date of the last payment of compensation, whether or not a compensation order has been issued"—simply establishes the date upon which the year begins to run, and does not establish the class of compensation cases to which the time limitation is relevant. The phrase means only that, if a party seeks modification of a prior compensation order, he or she must do so within one year after the last payment of compensation, whether or not the prior compensation order had been issued at the time of the last payment of compensation.

3. No Interest of an Employer or its Insurer is Jeopardized by Allowing the Employee's Claim To Be Adjudicated After Voluntary Payments Have Ceased

It might be asserted that if this Court agrees with our interpretation of Section 22 a large number of claims—unadjudicated because the employer has paid full and adequate compensation without the necessity of an award—will remain open and subject to further contest, even though they will have become stale. Cf. Pet. Br. 9–10, 25–26. This prospect is illusory.

More than 100,000 "injury cases" are reported to

the Department of Labor every year, as reflected in the table at Pet. Br. 25. Approximately 85 percent of these "cases" are injuries reported pursuant to Section 30(a) by employers but involving no compensable disability: the employee either lost no time from work, or lost less than three days' time, the non-compensable "waiting period" established by Section 6(a) of the Act.

Of those cases for which some compensation is due, the vast majority involve short-term total disability when the employee loses several days of work. Ordinarily such an employee automatically is compensated under Section 14(a) until his return to work, and never files a Section 13(a) claim. If no Section 13(a) claim has been filed, the employer's exposure to potential liability terminates when the one-year period has run.

Most of the remaining cases for which compensation is paid involve partial losses of use of some member of the body. All of these claims are "scheduled" under Section 8(c)(19), and compensation is due in a sum certain. These claims usually are resolved in a mutually satisfactory manner, and rarely require either a claim under Section 13(a) or an award by a deputy commissioner. The few disputes that require administrative resolution concern the fraction of loss of use of the member, and so do not produce claims that may linger to the detriment of an employer.

The Department of Labor estimates that in several hundred claims yearly a Section 13(a) claim is filed and the case remains open. In this class of cases, as

we previously have observed, it is to the advantage of both the employee and the employer to postpone administrative adjudication until accurate estimates of the extent and duration of disability can be made. If the claim is adjudicated too soon, and the employee's condition later improves, the employer can seek modification pursuant to Section 22. But until the change in condition is discovered and a new compensation order entered, the original order must be complied with. however clear it may be that it was mistaken or that it is now unwarranted.[23] Payments made under the order ordinarily are not recoverable even if they were greater than would have been proper, because Section 22 specifies that a modification of an award cannot retroactively affect the compensation already paid pursuant to an award. The employee is anxious to avoid the possibility of underpayments that cannot be made up;[24] the employer is anxious to avoid the possibility of overpayments that cannot be recouped, a possibility that is enhanced because doubtful factual questions presented for premature adjudication must be resolved in favor of claimants.[25] Discrepancies be-

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[23] Cf. *Dillard* v. *Virginia Industrial Commission*, 416 U.S. 783, 789.

[24] Section 22 prohibits new compensation orders that retroactively affect compensation already paid, although it permits future compensation to be increased.

[25] See, *e.g.*, *Robinson* v. *Bradshaw*, 206 F.2d 435 (C.A.D.C.), certiorari denied, 346 U.S. 899; *Butler* v. *District Parking Management Co.*, 363 F.2d 682 (C.A.D.C.); *Young & Co.* v. *Shea*, 397 F.2d 185 (C.A. 5) (collecting cases).

tween the actual payment and the proper payment can be more easily reconciled, however, if the entry of a formal compensation order is postponed.

Once an employer has become convinced that a resolution of the open controversy would be in its interest, it has a number of means available to secure an administrative adjudication. Under Section 19(c) of the Act any party to a pending compensation case is entitled to a hearing and a prompt decision upon demand. See *Atlantic & Gulf Stevedores, Inc.* v. *Donovan,* 274 F. 2d 794 (C.A. 5).[26] In the instant case, petitioners could have pressed the deputy commissioner for a decision after the conference in 1966, but they elected not to do so.

Alternatively, employers who believe that they are entitled to cease making payments can request the employee to agree to settle the claim for compensation already paid. This agreement can be submitted for approval pursuant to Section 8(i), 33 U.S.C. (Supp. II) 908(i). If this agreement is approved, it is embodied in a final compensation order.

In many cases, even if neither the claimant nor the employer requests action, the deputy commissioner, pursuant to Section 14(h)(2), is required to enter a controverted case in order to take action that "will properly protect the rights of all parties." If the deputy commissioner adheres to the requirement of

[26] Although we support the holding in *Donovan*, we disagree with the implication at 274 F.2d 797–798 that the pre-1972 Act excluded state compensation remedies. Compare Section 5 of the Act with 42 U.S.C. 1651(c) and 5 U.S.C. 8173; cf. *Industrial Commission* v. *McCartin*, 330 U.S 622.

Section 14(h)(2), an unadjudicated and controverted claim will not grow stale to the prejudice of any party.[27]

Finally, although we do not suggest this as a preferred course of action, an employer or insurer simply may cease its payments, as it did here, and await action by the claimant. If a claimant with a legitimate claim to additional compensation takes no action, the employer or insurer has escaped liability. If, on the other hand, an individual entitled to compensation delays, even for several years, protesting the discontinuation, the employer or insurer has lost nothing. The claimant eventually will receive an award requiring the insurer to make retroactive payments, but these payments will be compelled only if the termination of compensation was improper.

The employer can suffer prejudice because of a claimant's delay only if important evidence has been lost solely as a result of the delay. This will rarely be the case.[28] The employer knows—because a timely

[27] Of course, the deputy commissioner's neglect of his Section 14(h)(2) duties would not by itself terminate the claimant's right to compensation.

[28] Indeed, important evidence is much more apt to be lost in a class of cases in which stale claims can be made regardless of Section 13(a) or Section 22. Suppose, for example, that an employee is injured and is paid compensation without an award, first for a period of temporary total disability and then, after an examination by the insurer's medical staff, for continuing partial disability. Regardless of any interpretation of Section 22, an employee who has filed a timely Section 13(a) claim could assert, any number of years after the reduction of payments, that he had become totally disabled again shortly

claim under Section 13(a) has been filed but not adjudicated—that the propriety of its termination of payments is subject to question; it therefore will not dispose of the medical evidence supporting its actions.

A large fraction of the cases in which benefits are terminated after a lengthy period, but without an award having been made, involve claims of total and permanent disability, which the employer asserts is either permanent and partial or total but temporary. The evidence that would resolve such claims does not dissipate over time. If the employee is in fact permanently and totally disabled, relevant evidence is readily at hand after even a lengthy interruption in benefits. Similarly if, as the employer might claim, the disability is only partial, or has ended, the necessary evidence can be gathered from an examination of the claimant whenever he or she protests the termination of the compensation. Any prejudice that may remain is attributable to the congressional program, and

after the examination upon the basis of which payments had been reduced. If the employee had medical evidence to that effect, and if he should be found to be totally disabled at present, the employer may be unable to meet his allegation that he became so years ago, and will be required to make retroactive payments. Such a situation potentially could arise, and prejudice an insurer, far more often than the situation of the type exemplified by the instant case. Nothing in Section 22, even under petitioners' interpretation, guards against it. We submit that this and similar examples demonstrate that Section 22 is not designed, nor is it well suited, to prevent prejudice because of delay in claims in which there never has been a compensation order.

would not justify allowing Section 22 to become a trap for the unwary claimant who, confident that he has asserted his claim under Section 13(a), relies upon the employer to demand an adjudication if the employer believes that additional delay may be deleterious.[29]

Jones filed his claim under Section 13(a) within a month of his injury. At a hearing held in 1966, neither Jones nor Hartford requested the deputy commissioner to make an award; both parties were content to await further developments. After Hartford ceased paying voluntary compensation, the deputy commissioner adjudicated Jones' claim for the first time, and concluded that he was and is permanently and totally disabled. Hartford was not prejudiced in any way by the delay between the termination of payments and Jones' protest. We submit that the deputy commissioner's award of compensation, to which Jones concededly is entitled on the merits, should be upheld. Nothing in either the words or the history of Section 22, or in the legislative program implemented by the Act, suggests that his claim should be extinguished.

[29] If, as a result of extended and unjustified employee delay in objecting to the termination of payments, an employer or its insurer suffers demonstrable prejudice, a deputy commissioner, or a reviewing court, might be entitled to consider the delay as a good ground to diminish an award. But, as with the doctrine of laches in equitable actions, such diminution would be predicated on actual prejudice, and not merely the running of a specified period of time.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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